



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hayes International Corporation

File: B-224119

Date: January 2, 1987

DIGEST

1. Large business is an interested party to protest the agency's decision to set aside a procurement for small business concerns.
2. General Accounting Office will not object to agency's decision to set aside procurement for small business concerns where the record indicates the contracting officer had a reasonable expectation that offers would be obtained from at least two small business concerns and that an award would be made at a reasonable price.
3. Where a small business set-aside is found to be proper, a large business protester is not an interested party for the purpose of protesting the agency's decision to solicit bids rather than conduct negotiations.

DECISION

Hayes International Corporation (Hayes), a large business, protests the decision by the Department of the Army to procure Ballistic Aerial Targets (BATS) under small business set-aside procedures. The protest is denied in part and dismissed in part.

On August 5, 1986, the Army published an announcement in the Commerce Business Daily stating its intent to issue invitation for bids (IFB) No. DAAH01-86-B-0077, as a total small business set-aside. In response to this announcement, and prior to issuance of the IFB, Hayes filed this protest with our Office. The Army never issued IFB -0077. On November 6,

037727

1986, it issued IFB No. DAAH01-87-B-0006, which the Army advises is substantively identical to IFB -0077.^{1/}

Hayes contends that the procurement should not have been set aside for small business concerns on the ground that no small businesses are capable of performing the contract. Hayes states that, to the best of its knowledge, only three firms, other than Hayes, have developed any expertise in producing BATS, and that none of these is a small business. Hayes asserts that if the contracting officer had considered the past acquisition history--the last acquisition was in 1974 and the contractor had problems performing--along with the provisions of the Competition in Contracting Act of 1984 (CICA), as implemented by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2 (1985), he could not have reasonably concluded that the contract could be adequately performed by a small business concern.^{2/} In sum, Hayes contends that the decision to set aside this procurement for small businesses constituted an abuse of discretion.

The Army first argues that since Hayes is a large business and therefore ineligible for award under the terms of the solicitation, it is not an interested party for the purpose of protesting to this Office. We disagree. Hayes' direct economic interest is clearly affected by the Army's _

^{1/} Hayes asserts that the Army has inappropriately declined to provide Hayes with a copy of the earlier proposed solicitation (IFB -0077), despite Hayes' requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). Since that IFB was never issued, we question its relevance. In any event, the contracting agency has the primary responsibility for determining which documents are subject to release. Employment Perspectives, B-218338, June 24, 1985, 85-1 CPD ¶ 715. Under FOIA, only the contracting agency and the courts have authority to determine what information must be disclosed. Cottage Grove Surveying, B-223207, Sept. 2, 1986, 86-2 CPD ¶ 291.

^{2/} Hayes' reference to CICA's full and open competition requirements as a basis for sustaining its protest is without merit. CICA was amended to provide that an executive agency may procure using competitive procedures, but excluding other than small business concerns. See 10 U.S.C. § 2304(b)(1) (Supp. III 1985).

decision to exclude large businesses from competing for this contract. See 4 C.F.R. § 21.0(a) (1986). Accordingly, Hayes is an interested party for the purpose of protesting the decision to exclude large businesses. See Republic Steel Corp.; Penco Products, Inc., B-205951; B-205951.2, Apr. 29, 1982, 82-1 CPD ¶ 399.

The Army reports that the decision to set aside this procurement was a joint determination of the Small Business Administration (SBA) procurement center representative and the contracting officer under the authority of FAR, 48 C.F.R. § 19.501(b). The contracting officer relied on the following: the most recent BATS acquisition (1974) was achieved through award of a contract, at a reasonable price after competition, to a firm which currently qualifies as a small business concern; the solicitation mailing list contained the names of 39 small businesses (five provided by the SBA) believed to be capable of fulfilling the contract's requirements; and assurances were received from Army technical personnel that the specifications were adequate for competition. Additionally, the Army points out that 13 concerns, identifying themselves as small businesses, responded to the Commerce Business Daily announcement by requesting copies of the solicitation. Finally, the Army states that the contracting officer thoroughly reviewed previous BATS acquisitions and found that problems experienced in those procurements were primarily due to inaccurate gauging by a government inspector. Accordingly, the Army maintains there was no abuse of discretion.

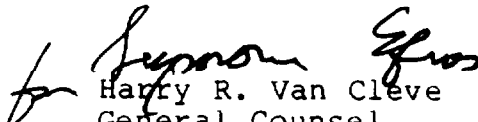
For a total small business set-aside, the FAR, 48 C.F.R. § 19.502-2, requires that there be a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that an award will be made at a reasonable price. This section of the FAR also expressly states that, while past acquisition history is important, it is not the only factor to be considered in determining whether a reasonable expectation exists.

Our Office has often held that the decision to set aside a procurement is basically a business judgment within the broad discretion of the contracting officer, for which we will not substitute our judgment. Mantech Int'l. Corp., B-216505, Feb. 11, 1985, 85-1 CPD ¶ 176; Advanced Construction, Inc., B-218554, May 22, 1985, 85-1 CPD ¶ 587. Accordingly, we will not object to a decision to set aside a procurement for small business concerns absent a clear showing of abuse of discretion.

Our review of the record does not indicate that the contracting officer abused his discretion. The record shows that the contracting officer considered past BATS procurements, SBA recommendations, the fact that there were nearly 40 small businesses on the mailing list believed capable of performing this contract, and technical advice. Hayes has provided no substantive rebuttal to these facts; rather, the protester has merely generally argued the perceived superiority of its capabilities vis-a-vis not only small businesses, but the other larger businesses with apparent expertise in this area. In view of this, we find that the agency's set-aside determination is supportable.

Hayes also asserts that this procurement should be conducted using negotiation procedures rather than sealed bids because of deficiencies in the Technical Data Package. Since we found no merit in Hayes' protest regarding the Army's decision to set aside this procurement for small businesses, Hayes is not an interested party for the purpose of protesting the procurement procedures the Army has selected. Telex Communications, Inc., B-216947, Nov. 26, 1984, 84-2 CPD ¶ 563.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel